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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 RITA J. SMITH,

9 Plaintiff,

10 v.

11 MICHAEL J ASTRUE, Commissioner of Social
Security,

12 Defendant.

Case No. C11-5386-JCC-BAT

**REPORT AND
RECOMMENDATION**

13 Rita J. Smith seeks review of the denial of her Supplemental Security Income and
14 Disability Insurance Benefits applications. Ms. Smith's primary contention is the ALJ
15 incorrectly found she had past relevant work as a telephone receptionist, was able to perform this
16 work, and was therefore not disabled.¹ Dkt. 16. The Court agrees and recommends the case be
17 **REVERSED** and **REMANDED** for further administrative proceedings.

18 **FACTUAL AND PROCEDURAL HISTORY**

19 Ms. Smith is currently 47 years old, has completed the 10th grade, and has worked as a
20 checker and a waitress.² On November 20, 2007, she applied for benefits, alleging disability as
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22 ¹ Ms. Smith argues if the Court rejects this contention, the Court should grant relief based on
23 other "defects" in the ALJ's step four analysis. As the Court agrees with Ms. Smith's primary
contention, the alternative defects need not be addressed. *See* Dkt. 16 at 7.

² Tr. 29, 141, 164.

1 of November 29, 1997.³ Her applications were denied initially and on reconsideration.⁴ After
2 conducting a hearing on January 7, 2010, the ALJ found Ms. Smith not disabled.⁵ As the
3 Appeals Council denied Ms. Smith's request for review, the ALJ's decision is the
4 Commissioner's final decision.⁶

5 THE ALJ'S DECISION

6 Utilizing the five-step disability evaluation process,⁷ the ALJ found:

7 **Step one:** Ms. Smith had not engaged in substantial gainful activity since November 29,
8 1997.

9 **Step two:** Ms. Smith had the following severe impairments: left ulna nerve injury, right
10 carpal tunnel syndrome, depression, and anxiety.

11 **Step three:** These impairments did not meet or equal the requirements of a listed
12 impairment.⁸

13 **Residual Functional Capacity:** Ms. Smith could perform less than the full range of
14 light work. She was capable of occasional fingering and handling with her left non-
15 dominant upper extremity and was capable of frequent fingering and handling with her
16 right, dominant, upper extremity. She could not reach over shoulder level. She could
17 frequently lift and carry up to 10 pounds. She has no sitting, standing, or walking
18 restrictions. She could recall, understand, and carry out simple and detailed, but not
19 complex, tasks and instructions. She could have occasional face to face interaction with
20 the general public; she had no telephone contact restrictions. She could have frequent
21 interaction with coworkers and supervisors.

22 **Step four:** Ms. Smith could perform her past work as a telephone receptionist and is
23 therefore not disabled.

Tr. 13-20.

19 DISCUSSION

20 At step-four, an ALJ must determine whether a claimant has the residual functional

21 ³ Tr. 141, 144.

22 ⁴ Tr. 87-93, 97-100.

23 ⁵ Tr. 8-24.

⁶ Tr. 1-6.

⁷ 20 C.F.R. §§ 404.1520, 416.920.

⁸ 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 capacity to perform her past relevant work. If a claimant can perform past relevant work, the
2 claimant is not disabled. The ALJ found Ms. Smith could perform her past relevant work as a
3 telephone receptionist at American Legal Truckers Association (Association) and was thus not
4 disabled. Tr. 19. Ms. Smith contends the ALJ erred because substantial evidence does not
5 support this finding.

6 In 1999 and 2000, Ms. Smith was employed as a telephone receptionist at the Association
7 for a total of six months. This job may be considered past relevant work only if it involved
8 “substantial gainful activity.” 20 C.F.R. § 404.1565(a); *Lewis v. Apfel*, 236 F. 3d 503, 515 (9th
9 Cir. 2001). To determine whether a particular job constitutes substantial gainful activity, the
10 Social Security regulations consider two employment categories: employee and self employed.
11 See 20 C.F.R. §§ 404.1574; 404.1575; 416.974 & 416.975. For employees, such as Ms. Smith,
12 the primary factor in determining whether past work is substantial gainful activity “will be the
13 earnings [the employee] derive[d] from the work activity.” *Id.* at §§ 404.1574(a)(1) &
14 416.974(a)(1).

15 There is a rebuttable presumption the employee either was or was not engaged in
16 substantial gainful activity if the employee’s average monthly earnings are above or below a
17 certain amount established by the Commissioner’s Earnings Guidelines. See *id.* at §§
18 404.1574(b)(2)-(3) & 416.974(b)(2)-(3); see also *Lewis*, 236 F.3d at 515 (“Earnings can be a
19 presumptive, but not conclusive, sign of whether a job is substantial gainful activity.”). In Ms.
20 Smith’s case, her prior work at the Association would be presumed substantial gainful activity if
21 she earned more than \$500 per month on average in the first half of 1999 or more than \$700 a
22 month on average in the second half of 1999 or all of 2000. See 20 C.F.R. § 1574(b) (2011).

23 Earnings, however, are not dispositive. The Commissioner may consider other evidence

1 to determine whether a claimant's past job is substantial gainful activity. For instance, where
2 there is other evidence indicating the claimant was engaged in substantial gainful activity, or that
3 a claimant was in the position to control the amount of wages he or she was paid, the
4 Commissioner may consider whether the work performed is "comparable to that of unimpaired
5 people in [the employee's] community who are doing the same or similar occupations as their
6 means of livelihood, taking into account the time, energy, skill, and responsibility involved in the
7 work[.]" 20 C.F.R. §§ 404.1574(b)(3)(ii)(A) & 416.974(b)(3)(ii)(A). The Commissioner may
8 also rely upon evidence that the employee's work is clearly worth more than the substantial
9 gainful activity amounts provided for the particular calendar year in the Commissioner's Earning
10 Guidelines based upon the prevailing pay scales in the employee's community. *Id.* at §§
11 404.1574(b)(3)(ii)(B) & 416.974(b)(3)(ii)(B).

12 The Commissioner does not dispute Ms. Smith's 1999 and 2000 Association earnings
13 were too low to establish that job was substantial gainful activity. This is significant because
14 where a claimant earned less than the required threshold to constitute substantial gainful activity,
15 the burden of proof shifts to the Commissioner. *See Lewis*, 236 F. 3d at 515 ("The presumption
16 that arises from low earnings shifts the step-four burden of proof from the claimant to the
17 Commissioner."). Moreover, "[w]ith the presumption, the claimant has carried his or her burden
18 unless the ALJ points to substantial evidence, aside from earnings, that the claimant has engaged
19 in substantial gainful activity." *Id.*

20 Under this standard the ALJ erroneously found Ms. Smith's past job at the Association
21 was substantial gainful activity. Based on Ms. Smith's past earnings at the Association, the ALJ
22 was required to presume that work was not substantial gainful activity. The ALJ, however, gave
23 no indication he recognized this presumption and failed to set forth facts supported by substantial

1 evidence showing Ms. Smith had performed substantial gainful activity at the Association.

2 Instead, the ALJ simply found Ms. Smith:

3 worked for the American Truckers Legal Association answering
4 phones and directing calls in 2001. Based on her earnings and her
5 testimony she worked at least three months and was let go not
6 because she was unable to do that job, but rather because the
7 employer did not like her. This personality conflict has nothing to
8 do with the claimant's ability to perform the job. The vocational
9 expert (VE) testified that no occupation listed in the DOT
10 adequately described this occupation. However, based on her
11 testimony, I find that she would be able to perform this occupation
12 as she performed it.

13 Tr. 19. These findings articulate the ALJ's views of Ms. Smith's residual functional capacity but
14 fail to elucidate whether the Association job constituted substantial gainful activity. In other
15 words, these findings fail to provide reasons supported by substantial evidence that establish the
16 Association job was substantial gainful activity and therefore past relevant work.

17 Because the ALJ improperly treated Ms. Smith's past work at the Association as
18 substantial gainful activity without properly explaining this determination, as was his burden, the
19 ALJ erred. This error is not harmless. The ALJ's step four determination that Ms. Smith was
20 not disabled rested entirely on the finding that Ms. Smith's past receptionist job was past relevant
21 work, and that Ms. Smith retained the capacity to perform that past work. The ALJ did not make
22 alternative findings at step five that there were other jobs Ms. Smith could perform and thus the
23 ALJ's step four error compels remand. Tr. 20. Accordingly, the matter should be remanded so
the ALJ may make proper, specific findings at step four on whether Ms. Smith's past work at the
Association constituted substantial gainful activity.

24 CONCLUSION

25 As discussed above, the Court recommends the Commissioner's decision be
26 **REVERSED** and the case be **REMANDED** for further administrative proceedings. On remand,

1 the ALJ should make proper, specific findings at step four on whether Ms. Smith's past work at
2 the Association constituted substantial gainful activity and therefore past relevant work. If the
3 ALJ determines that the Association job is not past relevant work, the ALJ should proceed to
4 step five of the five-step disability determination process.

5 Objections, if any to this Report and Recommendation must be filed and served no later
6 than **January 25, 2012**. If no objections are filed, the matter will be ready for the Court's
7 consideration on **January 27, 2012**. If objections are filed, any response is due within 14 days
8 after being served with the objections. A party filing an objection must note the matter for the
9 Court's consideration 14 days from the date the objection is filed and served. Responses to
10 objections must be filed no later than 14 days after being served with objections. Objections and
11 responses shall not exceed twelve pages. The failure to timely object may affect the right to
12 appeal.

13 DATED this 11th day of January, 2012.

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BRIAN A. TSUCHIDA
United States Magistrate Judge
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